LIBRARY
UPREME COURT, U. S.

FILED
MAY 15 1970
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of The United States

OCTOBER TERM, 1969

No. 1335

---

EUGENE SAND & GRAVEL, INC., *Appellant,*

CITY OF EUGENE, of Lane County, Oregon, a municipal Corporation, *et al, Defendants,*

*v.*

RAYMOND N. LOWE, *et al , Appellees.*

---

**PETITION FOR REHEARING**

---

**ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OREGON**

---

JOHN E. JAQUA
Counsel of Record for Appellant
WILLIAM G. WHEATLEY
JACK A. GARDNER
WARREN CAMERON
Of Counsel for Appellant
825 East Park
Eugene, Oregon 97401

May 14, 1970

**PETITION FOR REHEARING**

Appellant herein respectfully moves the Court for an order (1) vacating its dismissal of appeal, entered on April 20, 1970, and (2) granting the appeal or, in the alternative, referring back this cause to the Supreme Court of Oregon for such additional and proper steps as requested in the conclusion of this Petition, infra.

**1. IT IS SUBMITTED THAT NO ADEQUATE STATE GROUND EXISTS TO SUSTAIN A CLAIM FOR ESTABLISHMENT.**

(a) *The Establishment "evidence"*: The prime evidence relied on by Mr. Justice Goodwin in the December 19, 1969, opinion to sustain the claim of a state Establishment was a private document (Appellees' Ex "C") *not* an official city record (Appellees' Ex "B"). There is *no* mention of *any* religious activity in the ofcial record. The Oregon Court, per Mr. Justice Langtry, ruled no "religious activity" (following *Paul v. Dade County*) in its February 26, 1969, opinion. The private document, which contained statements of a spectrum of speakers from "A" to "Z" at the City Council December 14, 1964, meeting including Appellees' attorney Harrang, who arranged and paid for the document. It was apparently offered as a purported official city document (Supp to Petition for Writ of Certiorari, April 3, 1970, Appendix "W", "V") and was prepared before the trial, and is not a court-tested document (no confrontation,

no cross-examination). This appearing, and because of the heavy strength given to this document by Mr. Justice Goodwin, it is submitted that the "evidence" is improper, passed as "official"; but now shown unofficial (Supp to Petition for Writ of Certiorari, April 3, 1970, Appendix "V") and should be not considered in this matter de novo. *Finchum v. Lyons*, 247 Or 255, 262, 428 P2d 890 (1967); 30 Am Jur 2d Evidence, p 98, Sec 969; pp 102-103, Sec 972; p 138, Sec 1005; 32 CJS Evidence, pp 812-813, Sec 637. Being private, and not published in obedience to law, the material so discovered is hearsay and not within the exceptions to the hearsay rule.

Establishment was ruled on December 19, 1969, to exist on a state level. This Court has before it public record evidence that there is no general no-Establishment provision in the Oregon State Constitution; that it was inadvertently omitted. Article 1, Section 5, a *special* limitation, aimed at sectarian schools, and put in to go along with the missing Article 1, Sec. 4 from Indiana's Constitution, cannot be tortured into a *general* limitation. The general limitation is not there. There is no general no-Establishment provision in the Oregon Constitution and one cannot violate a missing section. If anything, by virtue of *Everson* and the 14th Amendment, there is a *Federal* question. This is what the Appellees have plumped for all along! Federal rights are directly in-

volved and no adequate state ground exists. The Chancellor's conscience still lives in the courts of equity; and this cause is de novo. Mr. Justice Goodwin cannot, in justice, arrogate to himself the role of a Constitutional Convention.

The *general* no-Establishment provision is *still* missing in the proposed constitution the voters will vote on May 26, 1970. Hans Linde, a counsel for Appellees, plus Mr. Justice Goodwin and Mr. Justice O'Connell, are members of the State Constitutional Commission, and the historical discovery was put before the Supreme Court of Oregon while the cause was on appeal December 7, *1967*. The people of Oregon are entitled to this provision, to know of it, and to vote on it May 26, 1970. See Appendix "A". Compare with existing constitution.

(b). *The Establishment claim in opinions*:

The October 1, 1969 and December 19, 1969, state court opinions show lack of adequate state ground.

Close attention of this Court is called to wording in the three opinions of Mr. Justice Goodwin at the state appellate level. His dissent of February 26, 1969, at 451 P2d 124 (which serves as the basis for his later majority opinion of October 1 and December 19, 1969) clearly states in column 2, paragraph 1:

> "Turning to our state constitution, and given the majority's acknowledgment that the cross dis-

> play is that of a religious symbol, there is *further reason* to rebuke the city council."

This quotation follows his discussion of the *Schempp* case. The *Dickman* case quoted at the state level is clearly not authority for the proposition he states. The *Dickman* case came under Article 1, Section 5 of the Oregon State Constitution since $4,000 from the state treasury was expended for books for the benefit of sectarian schools. The "pressure" of which Mr. Justice Goodwin speaks is based on an unofficial city document (Plaintiff's Exhibit "C"). When the Justice used the word "further", he obviously meant "additional" not "independent"; otherwise he would have surely said so.

The October 1, 1969 opinion, 459 P2d 224 (5), again refers to "reasons" (plural) set forth in his February 26, 1969 dissent. Attention is also called to his opinion of December 19, 1969, 463 P2d 364 (6), where he states:

> "We are, therefore, content to let stand our statement in the October 1 opinion, which grounded the decision on the merits in this case *in part* upon state as well as federal constitutional concepts."

This language in logic and wording militates against any type of *independent* state ground, let alone the adequateness of same.

The non-federal ground is not tenable, not broad enough and is not independent of the federal question.

Stern and Gressman, *Supreme Court Practice*, pp 138-142 (4th ed 1969).

Counsel strongly stress that in striking down the revocable city permit under the Oregon State Constitution, Mr. Justice Goodwin acted under what is conceived to be a compulsion of the federal constitution. A careful reading of his opinions in this case shows that this was first, foremost and predominant in his mind. See *Department of Mental Hygiene v. Kirchner*, 380 US 194, 201 and *Jankovich v. Indiana Toll Road Commission*, 379 US 487, 492. In *Jankovich* the Court at p 492 indicated that the federal and state issues were interwoven "because it [the court] felt under compulsion of federal law as enunciated by this court [Supreme Court of the United States] to so hold". It is submitted that a careful study of Mr. Justice Goodwin's three opinions uncontestably show that *Schempp* was foremost in his mind and that the federal concept controlled.

As in *Ward v. Love County*, 253 US 17, 22-23, the Appellant in *Lowe* set up constitutional rights and is entitled to invoke the jurisdiction of this court whether or not such right was given due recognition by the Supreme Court of Oregon. It is within the province of this Court to inquire not only whether the rights were denied in express terms, but whether they were denied in substance and in effect by putting forward non-federal

grounds of decision *without fair or substantial support.* There is no question but that, on the assertion of Appellant's own rights, the Supreme Court of Oregon refused to hear same. Such is not an adequate support for the state judgment. *Postal Tel. Cable Co. v. Newport,* 247 US 464, 475-6. Mr. Justice Goodwin cannot defeat the plain assertion of Appellant's federal rights. See *Davis v. Wechsler,* 263 U.S. 23, 24 and *NAACP v. Alabama,* 357 U.S. 449.

**2. THE STATE COURT OCTOBER 1, 1969, OPINION ON THE PRO TEM JUSTICE ISSUE LACKS ADEQUACY IN BEING (a) BASED ON A MATERIAL ERROR OF LAW AND (b) THE RULE OF COURT IS CONTRARY TO STATE STATUTE.**

Mr. Justice Goodwin committed a material error of law in his October 1, 1969 opinion when under the guise of the "California rule" he indicated that California, Oklahoma and Illinois all supported his position, quoting cases from said jurisdictions. See Appendix "B" for letters from the respective clerks of court of these three jurisdictions explaining that the rule in that jurisdiction is not what Mr. Justice Goodwin generally concludes it to be. The Justice therefore has attempted to hoist himself on his own petard in setting up some kind of authority to justify his position. His position is not only untenable on the law of the jurisdictions which he quotes but it is entirely contrary to Oregon Revised Statutes 14.210 (1) (b) which reads:

> "A judicial officer shall not act as such in a court of which he is a member if any of the following cases: * * *
>
> (b) When he was not present and sitting as a member of the court at the hearing of a matter submitted for its decision; * * * "

Under the statutes of the State of Oregon, a Supreme Court Justice is clearly a "judicial officer." See Supplement to Jurisdictional Statement, Appendix "1" for a clear detailing of these. It is fundamental law that a rule of court which conflicts with a statute must bow to it.

It is serious enough that Appellant should be deprived of due process on a massive scale at the trial level. Deprivation of due process at the appellate level makes a *tandem* deprivation which calls for reversal.

**3. THE PRESENT NATIONAL UNCERTAINTY CREATED BY LOWE ARGUES STRONGLY FOR HEARING OF THIS CAUSE BY THIS COURT.**

Similar litigation is before the Oklahoma Supreme Court (*Meyer v. Oklahoma City*). Litigation is shaping in Pittsburgh. The television program "Bonanza", Sundays at 9 p.m. shows the lighting of a fuse that soon envelops the whole picture. Should we, as in the prayer and Bible litigation, wait a half century for review? This Court indicates it will move in "Establishment" matters when necessary (See *Walz*, 338 LW 4351). The time is necessitous in *Lowe*. Prayers and catechisms can be

read off school property and no monetary damage is done. But each monument, rich in history, beyond price in tradition and heritage, when once destroyed, can never be replaced, like the "bold peasantry" in Gray's "Elegy". Here then is the "item priceless"—the perfect place for equity to exercise its jurisdiction, according to the well-remembered test of Zechariah Chafee, Jr. Shall we wait for the bulldozers to do their work and then cry "stop"? It will be too late. The occasion is extraordinary. *All* appeal factors, including the importance of the missing no-Establishment provision to the people of Oregon, militate for review.

Then, too, a review of this case can set at rest the assaults on varied traditions implicit in our polity—plaques, memorabilia, right of way signs, chapels, mottos, carrilons, etc. None will be immune from attack if *Lowe* stands—for *Lowe*, though it stands alone, is fraught with danger that can sweep like a conflagration. The fuse has been lit. It should be extinguished; and review only by this Court can do that. Bibles in our courts and crucifixes in courts of Europe are used as reminders to tell the truth (secular). Sunday has come to have a day of rest secular content (*McGowan v. Maryland*). The use, the time, the place, the evidence should tell *something* about symbols. The vice of *Lowe* is an assumption that all crosses, of which there are 374 or more forms, are "Establishments" and Christ in concrete. No case should be one in which Establishment is assumed. A review of

*Lowe* will settle and discourage the capitous complaints that have been flooding our courts since *Everson*. Postage stamp "Madonnas" and reflections of our culture and traditions deserve a better fate than constant attack by a few who would tear down all and give us a sterile absolute secularism only in return. In the words of the late and great Learned Hand:

> "The First Amendment * * * gives no one the right to insist that * * * other conform to his own * * * ."

It is time again to begin accentuating the positive in our sectional and national living.

**CONCLUSION**

It is respectfully requested that this Court reconsider and hear this cause on appeal. If this request is denied, then, in the strong interests of justice and in the collective welfare of the people of Oregon it is requested that this Court:

(1) vacate and remand to the Supreme Court of the State of Oregon for further consideration in the light of the missing no-Establishment provision and the lack of in the proposed constitution so that the matter may be treated immediately by that Court prior to the May 26, 1970 election involving the fundamental liberties of the people, or (2) continue this cause in this Court to enable counsel for Appellant to apply to the state court for amendment or revision of its decision or request a cer-

tificate from the Supreme Court of Oregon showing whether that Court intended to rest its judgment on an adequate and independent state ground or whether the decision of the federal question was necessary to the judgment rendered; (3) vacate and remand to the Supreme Court of the State of Oregon with instructions to appoint a master or referee under ORS 17.705-17.765 to hear the War Memorial issue, the missing "no Establishment" provision issue, and properly evaluate and consider Appellees' trial Exhibit "C" and to render Appellant due process of law in other respects.

The Court's special attention to Appendix "E" is called. The opinion arrived in time for comment in the Appendix.

Respectfully submitted,

JOHN E. JAQUA
Counsel of Record for Petitioner

WILLIAM G. WHEATLEY
JACK A. GARDNER
WARREN CAMERON
Of Counsel for Petitioner

825 East Park
Eugene Oregon 97401

May 14, 1970

## APPENDIX "A"
## BILL OF RIGHTS IN PROPOSED CONSTITUTION TO BE VOTED ON MAY 26, 1970, BY OREGON VOTERS SHOWING MISSING NO-ESTABLISHMENT PROVISION STILL MISSING.

### ARTICLE I

### BILL OF RIGHTS

**Section 1.** The rights enumerated in this Constitution are independent of and supplementary to those guaranteed under the Constitution of the United States. The people at all times have a right to alter, reform or abolish the government in the manner they may think proper.

**Section 2.** The right of free expression of opinion and to speak, write or print freely on any subject shall not be restrained, but every person shall be held responsible under law for injury done by abuse of that right.

**Section 3.** The right of the people peacefully to assemble and to petition the government shall not be abridged.

**Section 4.** Every person shall be secure in the right to worship God according to the dictates of his own conscience. A law shall not restrain the free exercise and enjoyment of religious opinions or interfere with the rights of conscience.

**Section 5.** Public money shall not be appropriated or spent for the benefit of a religious institution or for the payment of a religious service in either house of the Legislative Assembly.

**Section 6.** A religious test shall not be required as a qualification for a public office or employment, nor shall a witness or juror be questioned about his opinions on matters of religion. Oaths or affirmations administered to a person shall be in the mode most consistent with and binding on his conscience.

**Section 7.** The right of the people to be secure in their persons, houses and other property, papers and effects, against unreasonable searches and seizures shall not be violated; and a warrant shall not issue but on probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized. A person shall not be compelled to give testimony that might tend to incrimina e him.

**Section 8.** In a prosecution for a crime or offense punishable by loss of liberty:

(1) The accused has the right to a timely and public trial in the county in which the crime or offense is committed.

(2) The accused has the right to be tried by an impartial jury, except when he elects to be tried by the judge of the court alone or when he is charged with contempt of court.

(3) The accused has the right to know the nature and cause of the accusation against him and to have a copy thereof, to be heard in his own behalf, to meet witnesses face to face and to have compulsory process for obtaining witnesses.

(4) A jury shall determine the facts under the direction of the court as to the law. Verdicts by five-sixths of a jury may be authorized by law, but a verdict of guilty of a capital crime or offense must be unanimous.

**Section 9.** Every person has the right to assistance of counsel in all official proceedings and dealings with public officers. If he cannot afford counsel, he has the right to have counsel appointed for him in any case in which he may lose his liberty.

**Section 10.** A court shall not be secret, and justice shall be administered openly and without purchase or delay. A person shall not be deprived of any right, privilege or liberty by any unlawful or unfair procedure, or be denied remedy in due course of law for injury done him in his person, property or reputation.

**Section 11.** Every person, before judgment of conviction, is entitled to bail by sufficient surety, but excessive bail shall not be required. Bail may be denied to a person charged with a crime or offense punishable capitally or by life imprisonment, giving due weight to the evidence and to the nature and circumstances of the event. In the discretion of the court, bail may be allowed after judgment of conviction. A person arrested or confined shall not be treated with unnecessary rigor.

**Section 12.** Laws for the punishment of crime shall be founded on the principles of reformation, and not of vindictive justice. Excessive fines or cruel and unusual punishments shall not be imposed. Punishment shall not be disproportionate to the nature of the offense. A conviction shall not cause corruption of blood or forfeiture of estate.

**Section 13.** A person shall not be subjected unnecessarily to several prosecutions for the same conduct, or be put in jeopardy twice for the same offense.

**Section 14.** Imprisonment for debt shall not be imposed, except in case of fraud or absconding debtors.

**Section 15.** The privilege of the writ of habeas corpus shall not be suspended. The operation of the laws shall not be suspended, except by authority of the Legislative Assembly.

**Section 16.** Treason against the state consists only in levying war against it or in adhering and giving aid or comfort to its enemies, and shall not otherwise be defined under another name. A person shall not be convicted of treason except on the testimony of two witnesses to the same overt act or on confession in open court.

**Section 17.** The people have the right to bear arms for the defense of themselves and the state.

**Section 18.** The military shall be subordinate to the civil power. In time of peace a member of the armed forces shall not be quartered in a house without the consent of the owner or occupant, or in time of war except as provided by law.

**Section 19.** Private property shall not be taken or damaged for public use, or the particular services of a person be demanded, without just compensation; or, except as provided by law, without just compensation first assessed and tendered.

**Section 20.** A law shall not grant to any person or class of persons privileges or immunities that, on the same terms, do not belong equally to all persons.

**Section 21.** An ex post facto law or law impairing the obligations of contracts shall not be enacted.

**Section 22.** The taking effect of a law shall not be made to depend on any authority except as provided in this Constitution.

# APPENDIX "B"
# "PRO TEM JUDGE ISSUE"—50-STATE SURVEY

G. E. BISHEL, CHIEF DEPUTY

DEPUTIES
JOSEPH M. ROGERS
KEITH M. HAWKES
REMO C. MATTEOLI
MARK F. THOMPSON
SAN FRANCISCO

DAVID BLOMGREN
ROBERT F. JOHNSON
LOS ANGELES

A. F. BRADOVICH
SACRAMENTO

OFFICES
SAN FRANCISCO 94102
4250 STATE BUILDING

LOS ANGELES 90012
1008 STATE BUILDING

SACRAMENTO 95814
108 LIBRARY AND COURTS BUILDING

OFFICE OF THE CLERK

Supreme Court of California

WILLIAM I. SULLIVAN, CLERK

San Francisco, California
December 8, 1969

RECEIVED
DEC 9 1969
JAQUA, WHEATLEY & GARDNER
ATTORNEYS AT LAW

William J. Wheatley, Esq.
825 East Park
Eugene, Oregon 97401

Dear Sir:

This is in response to your letter of December 2. Prefatory to any discussion of your inquiry we must refer to our form of assignment of appellate justices. Any justice of the intermediate appellate Court of Appeal who is assigned to the Supreme Court is assigned for a definite period (i.e., from a designated starting date to a designated later date "and until he has completed and disposed of all causes and matters submitted to him").

The necessity for assigning a pro tempore justice may arise from either of two situations:

1. Absence of a regular justice of the court, or

2. Disqualification of a regular justice of the court.

Under our practice, if the pro tem. justice is assigned and participates in the disposition of a case because of the absence of a regular justice, and the regular justice returns or is available to act on any petition for rehearing, or is available after a rehearing has been granted, the regular justice (and not the pro tem. justice) acts on the petition for rehearing or on the subsequent disposition of the case after the rehearing had been granted.

On the other hand, under our practice, if the pro tem. justice is assigned and participates in the disposition of a case because of the disqualification of a regular justice, the pro tem. justice acts on the petition for rehearing and on the subsequent determination of the case after rehearing is granted even though these events may occur after the expiration of the definite period designated in the assignment, and this is so because of the language first quoted above, i.e., "and until he has completed and disposed of all causes and matters submitted to him."

William J. Wheatley, Esq.
Page Two December 8, 1969

It is suggested that you read the decision of our Supreme Court in L.A. 17511 - The Metropolitan Water District of Southern California v. Adams and Holmes, reported in 19 Cal.2d at page 463, 122 P.2d 257.

The decision in that case is discussed in 3 Witkin, California Procedure at page 2409. A copy of that discussion is enclosed.

It is hoped the foregoing will be of assistance to you.

Very truly yours,

William I. Sullivan

WILLIAM I. SULLIVAN,
Clerk of the Supreme Court

WIS:ct

Enclosure

V

STATE OF ILLINOIS

OFFICE OF

CLERK OF THE SUPREME COURT

SPRINGFIELD

62706

JUSTIN TAFT
CLERK

December 15, 1969

TELEPHONE
AREA CODE 217
525-3033

RECEIVED
DEC 18 1969
JAQUA, WHEATLEY & GARDNER
ATTORNEYS AT LAW

Mr. William G. Wheatley
Attorney at Law
Jaqua, Wheatley & Gardner
625 East Park
Eugene, Oregon 97401

Dear Mr. Wheatley:

The question posed in your letter is interesting and novel but without answer in Illinois. Neither the Illinois Constitution, Statutes nor Rules of this Court provide for the situation outlined in your letter.

The practice in Illinois does not permit the appointment of a pro tem Justice either by the Governor or by this Court, although under our present Constitution, retired judges may be recalled, with their consent, to serve. At the present time, there are three Justices on the Supreme Court who had retired as either circuit or appellate court judges. Two former Justices who recently resigned are living but have not taken part in any action on rehearings before the Court even though they voted on the opinion to which the rehearing petition is directed.

In Illinois there is no oral argument when a rehearing is granted but the case is resubmitted solely on the original briefs, petition for rehearing, answer and reply.

From the foregoing, if we were compelled to give an answer, we would respond to your question in the negative.

Very truly yours,

Clerk of the Supreme Court

JT:hw

SUPREME COURT OF OKLAHOMA
OFFICE OF THE ADMINISTRATIVE DIRECTOR OF THE COURTS
OKLAHOMA CITY, OKLAHOMA 73105

MARIAN P. OPALA
Administrative Director
of the Courts

305 State Capitol
AC 405 521-3842

December 9, 1969

RECEIVED
DEC 15 1969
JAQUA, WHEATLEY & GARDNER
ATTORNEYS AT LAW

William G. Wheatley, Esq.
Messrs. Jaqua, Wheatley &
Gardner
Lawyers
825 East Park
Eugene, Oregon 97401

Dear Mr. Wheatley:

Your inquiry of December 2, 1969 has been referred to me for reply.

The matter you inquire of is settled neither by statutory or constitutional provision nor by rule of court or decisional pronouncement. The tradition in Oklahoma has it that the pro tem justice who participates in the consideration of a case continues to serve until its final disposition by the Supreme Court unless prevented from so doing by death or a physical disability.

I trust this answers the question you posed.

Sincerely,

Marian P. Opala

MPO:bl

**APPENDIX "C"**
**CROSS AND ESTABLISHMENT COMMENT OF MR. JUSTICE DOUGLAS**
**Eugene Register Guard, February 24, 1965, Page 1A**

# *Supreme Court's Rule Described by Douglas*

By SAM FREAR of the Register Guard

"Justice William O. Douglas of the U.S. Supreme Court spent six hours in Eugene Tuesday, and the outspoken 66-year-old jurist commented on China, Viet Nam, the United Nations, the Oregon Dunes, Eugene's cross and a host of other subjects. * * *

"In a press conference before his talk, Douglas ranged over a wide spectrum of questions.

"He did not appear too concerned about Eugene's controversy over placing a cross on public property, Eugene's Skinner Butte Park. Supreme Court cases on the separation of church and state have been worried about 'quite a different problem,' he explained.

" 'Our idea is to keep the state out of the business of establishing religion,' Douglas said, 'and establishment means putting the state behind the rites, ritual or dogma of any one religion.' " * * *

## APPENDIX "D"
## INFORMAL OPIONION OF ATTORNEY GENERAL OF STATE OF OREGON.

November 13, 1969

MEMORANDUM
To: Dr. R. E. Lieuallen
From: Ray Underwood
Subject: University of Oregon Medical School's Lighted Cross on Side of Doernbecher Memorial Hospital During Christmas Season

The American Civil Liberties Union of Oregon, through its chairman, Mr. Charles Davis, has asked the position of your office regarding the above described display.

The Oregon Supreme Court has recently held that the erection of an illuminated cross on city property was unconstitutional as a religious display. *Lowe v. City of Eugene,* 89 Or. Adv. Sh. 323 (1969), withdrawing the majority opinion in its first consideration of the case in 87 Or. Adv. Sh. 1059 (1969). The opinion affirmed the decree of the trial court for the reasons set forth in the dissenting opinion of the Oregon Supreme Court in its first consideration of the case. A copy of that opinion is attached.

The facts in the Medical School display are essentially similar to the facts of the *Lowe case.* Therefore, it is my opinion that the Medical School display is unconstitutional also.

It is my understanding that an attempt is being made to obtain a ruling by the United States Supreme Court in the *Lowe* case. However, I doubt that the latest ruling by the Oregon Supreme Court will be modified by the United States Supreme Court. In any event, until such a modification is made, the *Lowe* ruling is the controlling law.

RPU:ej

## APPENDIX "E"

## NO "ESTABLISHMENT" EXISTS UNDER WALZ v. TAX COMMISSION OF THE CITY OF NEW YORK, 38 LW 4347

Any power overload in one church feared by Madison or Jefferson in 1802 was dispersed into a multiplicity of religious sects. The monolithic single ruler of Europe, omnipresent in the Danbury letter, proved not the American way—many religious organizations in a Federalistic government of the people (9th and 10th Amendments). But the image of a solid "wall" persisted into American history, nursed by *Reynolds v. United States,* 98 U.S. 145 until softened by the "wholesome neutrality" of *Schempp,* and now the "benevolent neutrality" of *Walz.* How much more suited to activist religious sects (recognized as equals with other political and social groups as working forces in society), espousing common values and goals, would be Madison's "line of separation" promulgated in 1832 in a letter to the Reverend Jasper Adams in which he wrote that he had to:

> "admit * * * that it may not be easy in every possible case, to trace the line of separation between the rights of religion and Civil authority with such distinctness as to avoid collisions & doubts on unessential points. The tendency to a usurption on one side or the other, or to a corrupting coalition or alliance between them, will be best guarded against by an entire abstinance of the Government from interference in any way whatever, beyond the necessity of preserving public order, & protecting each sect against trespasses on its legal rights by others." *

The Madisonian "line" finds expression in the "channel" of Mr. Justice Harlan in *Sherbert,* 374 U.S. 398, 422, the "boundaries" and "not * * * an absolutely straight line"; of Mr. Chief Justice Burger in *Walz,* 38LW at 4348. The "serpentine wall" once envisioned by Mr. Jus-

*See also statements of Mr. Chief Justice Hughes and Mr. Justice Holmes in Westin, *The Supreme Court: Views from Inside,* p 43 (W. W. Norton & Co., N. Y. 1961).

tice Jackson may be today's somewhat meandering line.

The "sponsorship, financial support and active involvement" making up "Establishment" for the Founding Fathers and noted in *Walz*, 38 LW 4348 is lacking in *Lowe*. There is no showing that this cross has been used here *exclusively* as a religious symbol; and it has been shown that the purpose has been secular over the 34 years Chamber of Commerce spair (as in *Paul*)—namely a beacon, symbol of goodwill and foremost—decoration, which is not indoctrination. Mr. Justice Goodwin assumes "Establishment" in a cross ab initio, and equates it with a "silent witness to faith." Things become holy by association with things holy, wrote Tillich. This should be good law here.

Mr. Justice Douglas, in comments to the Eugene newspaper (see Appendix "C") high-pointed the absence of organized religion and worship, rites, ritual. The record is barren of *any* religious ties in, or connection with any organized religious body (*Davis v. Beeson*, 133 U.S. 333; see also *Terrett v. Taylor*, 9 Cranch 41, 48). City Manager McKinley testified that the park was open to all (Tr 796-812) thus no *favoring* of sect. Neither a religious body erected the cross, nor does it maintain it. Parks are for a divergence of culture and attitudes. Is San Francisco's Statue of Buddha an "Establishment"? Its totem pole? Its Father Serra with cross? Its Prayer Book Cross? Rather, they give, with the Young Museum, a wonderful diversity of culture and community heritage.

Heritage should mean something. 200 years of church tax exemptions will withstand challenge, according to the twice-used quotation of Mr. Justice Holmes in *Walz*, as well as in *Lincoln v. Page*, 241 A2d 799 (NH 1968). Monuments and memorials have been part of Mr. Justice Brennan's "civil polity" from the earliest towns and cities, predating Christianity. See 1 McQuillin, *Municipal Corporations*, 90, Secs 1.32-1.35. Therefore, should not more than 2,000 years of the custom of monuments, including crosses used as palladia of civil liberties in Europe, the market crosses of England, and the land-

marks and cemetery usage in the United States, call for something beyond the informal record of hearsay (Appellees' Exhibit "C"), Mr. Justice Goodwin relied on to hoist, *deus ex machina*, an assumed "Establishment?" The primary purpose and effect of this monument, in the building permit, testimony of the erector, Mr. Alltucker, and the history of the crosses in the Chamber of Commerce records, is overwhelmingly secular and the Oregon Court so found in its February 26, 1969 opinion. See *Walz* 38 LW 4349 citing *Sherbert*, 374 U.S. at 423.

Tradition should mean much. In *Walz* 35 LW 4352, Mr. Justice Brennan states:

> "The more longstanding and widely accepted a practice the greater its impact upon constitutional interpretation."

Monuments, as well as church tax exemptions, should be "accepted as a matter of course", in the words of Mr. Justice Harlan in *Walz*, 382 LW at 4357. Professor Freund, with acuity points out, in *Time*, December 11, 1964, p 59:

> "It is hard to see how such things can be challenged in law so long as they are not addressed to a captive audience and do not call for a profession of commitment or rejection on the part of those who witness them."

There is no intellible "nexus" between a monument and "Establishment", either in *Paul v. Dade County* or in *Lowe*—yet opposite results have been reached to the confusion of the country. Religion is surely not present in the sense of "organized religion" spelled out so well in *Davis v. Beeson*, or in Madison's "line". There is no continuing involvement, nor excessive involvement. See *Walz*, 38 LW 4350. The city's role has been minimal. It merely granted a revocable permit on public property. The City Council was arrogated to do this in practice. The City Engineer's office handles the private permits. There is *no* financing, no taxing. Mr. Alltucker had paid for the electricity from the beginning. *All* the indicia of "Establishment" are absent according to *Walz*. Here is not the championing of organized religion *per se* and *qua* religion.

Prepared by Warren Cameron

PROOF OF SERVICE

STATE OF OREGON )
) ss.
County of Lane )

I, JOHN E. JAQUA, an attorney in the office of Jaqua, Wheatley & Gardner, attorneys of record for Appellant, Eugene Sand & Gravel, Inc., depose and say that on the 14th day of May, 1970, I served a copy of the foregoing Petition for Rehearing on Appeal in compliance with Rule 33 (1) (3) (4) of the Supreme Court of the United States on

Hans A. Linde
Attorney at Law
1858 University Street
Eugene, Oregon 97401
(residence)
James J. Harrang
Attorneys at Law
631 Pearl Street
Eugene, Oregon 97401
Attorneys for Appellees

Herman P. Hendershott
City Attorney
City Hall
Eugene, Oregon 97401
Attorney for Defendants

bi placing a true and correct copy thereof, duly certified to be such by me as such attorney, in a sealed envelope, postage fully prepaid and depositing the same in the U. S. Post Office, at Eugene, Lane County, Oregon, on the date stated below. Said attorneys reside or have their offices at said addresses.

I certify that I reside and have my office in Eugene, Lane County, Oregon.

Dated: May 14, 1970

JOHN E. JAQUA
Counsel of Record for Appellant
825 East Park
Eugene, Oregon 97401